

EXHIBIT 4

JOSEPH MANTHA,

Plaintiff,

v.

QUOTEWIZARD.COM, LLC,

Defendant.

Proceedings in the United States District Court
for the District of Massachusetts

Case No.: 1:19-CV-12235-LTS

**MICROSOFT CORPORATION'S
OBJECTIONS TO SUBPOENA TO
PRODUCE DOCUMENTS,
INFORMATION OR OBJECTS OR TO
PERMIT INSPECTION OF PREMISES IN
A CIVIL ACTION**

Pursuant to Rule 45 of the Federal Rules of Civil Procedure, nonparty Microsoft Corporation ("Microsoft") makes the following objections to the subpoena from Quotewizard.com, LLC ("Defendant") in the above-referenced matter. Microsoft's objections and responses are based on its investigation to date. Microsoft expressly reserves the right to modify and supplement these objections and responses if additional information or documents are located by Microsoft. Microsoft assumes no obligation to supplement its responses, beyond those permitted by applicable court rules, if any. To the extent that a meet and confer regarding any of these objections is necessary, please contact undersigned counsel.

I. GENERAL OBJECTIONS

1. Improper Place of Compliance. Microsoft objects to the subpoena as improper because the demanded place of production is not in King County, Washington, where Microsoft

1 resides and regularly transacts business in person. *See* Fed. R. Civ. P. 45(c)(2)(A). The subpoena
2 fails to comply with federal law regarding place of compliance.

3 **2. Subscriber Notification.** Upon proper service of a nonparty subpoena seeking
4 business records, Microsoft implements basic procedures to attempt to locate and preserve the
5 information sought. If the subpoena requests subscriber information, Internet Protocol address
6 history logs, or similar associated data (collectively “Subscriber Data”), pursuant to industry
7 standard and court-approved practice, after locating the account and preserving the responsive
8 data, Microsoft notifies the subscriber of the subpoena and permits the subscriber a 14-day period
9 during which the subscriber may formally challenge or otherwise limit the subpoena requests by
10 making an appropriate motion before the relevant court. Upon expiration of the 14-day waiting
11 period, if the subscriber has failed to take timely action and if there are no valid reasons for
12 Microsoft to object to the subpoena, Subscriber Data, if available, is typically produced, along
13 with a document certifying its authenticity.

14 Following internal review and processing procedures, Microsoft initiates the processes
15 necessary to locate and preserve the data requested and, where active accounts are identified,
16 attempts to notify the subscriber(s) of your Subpoena and of the 14-day period to take appropriate
17 court action.

18 **3. Preservation of Content.** As noted above, Microsoft has implemented measures
19 to electronically preserve the content data you have requested pending your pursuit of a court
20 order or account holder consent as specified above. However, given the frailty of electronic data,
21 Microsoft cannot guarantee that no data will be lost as a natural function of standard retrieval and
22 preservation processes. Further, please note that Microsoft cannot preserve the data indefinitely
23 in anticipation of further action. Unless Microsoft receives written notification of your intent to
24 pursue account holder consent within 45 days of the date of this letter, Microsoft may permit the
25 electronic mail content data preserved in response to your request to be deleted as a function of
26 routine document maintenance.
27

1 As Microsoft is not a party to this matter and has no interest in its outcome, it is neither
2 Microsoft's intent, nor its desire, to hinder or delay production of the documents requested by
3 you. Microsoft has implemented the procedural requirements noted above in order to conform
4 with what it believes to be proper under applicable local, state, and federal laws and public
5 policies.

6 **4. Explanation of Inactive And NSU Status Determinations.** Typically all email
7 content and Internet Protocol Log data associated with accounts that are affirmatively closed by
8 their account holders, or with accounts that are left inactive for approximately 270 days, are
9 permanently deleted. The remaining "shell" account containing only the registration information
10 provided by the subscriber is labeled "inactive." After an additional 95 days, the shell account is
11 also permanently deleted, and the email address returned to the pool of available addresses.

12 **5. Deleted Emails.** Please be advised that contrary to what appears to be a popular
13 conception, Microsoft does not maintain comprehensive archives of content sent from or received
14 by Skype service accounts. All of the communication content possessed by Microsoft with
15 regard to any given user account consists only of those messages or recordings accessible to the
16 account holder. Microsoft does not maintain a database of deleted messages, recordings or audio.

17 **6. Contrary to the Electronic Communications Privacy Act.** Microsoft objects
18 to the subpoena to the extent it seeks communications protected from disclosure by the Electronic
19 Communications Privacy Act ("ECPA"), 18 U.S.C. §2510 to §2711, which prohibits the
20 disclosure of communication data in electronic storage without the consent of the account holder.
21 Microsoft falls within either the definition of a "person or entity providing an electronic
22 communication service to the public" or "a person or entity providing remote computing service
23 to the public." 18 U.S.C. §2702(a), (b). The ECPA allows entities that provide electronic
24 communication or remote computing services to the public to divulging communication data in
25 electronic storage only in the case of the exemptions in 18 U.S.C. §2702(b). None of these
26 exemptions appear to be applicable in this case. The exemptions under 18 U.S.C. §2702(b) do
27 not authorize disclosure of electronic communications even in response to a civil subpoena or

1 even a court order. The unauthorized disclosure of such content could subject Microsoft and you
2 to serious civil and criminal penalties. 18 U.S.C. §2707.

3 We are not aware of any controlling authority holding that services such as Microsoft's
4 Services are permitted by the ECPA to disclose communication data in electronic storage in
5 response to a civil subpoena. To the contrary, courts have ruled that contents of communications
6 may not be disclosed to civil litigants even when presented with a civil subpoena. *O'Grady v.*
7 *Superior Court*, 139 Cal.App.4th 1423, 1448 (Cal. App. 2006); *accord* The U.S. Internet Service
8 Provider Association, *Electronic Evidence Compliance—A Guide for Internet Service Providers*,
9 18 BERKELEY TECH. L. J. 945, 965 (2003) ([No Stored Communications Act provision]
10 "permits disclosure pursuant to a civil discovery order unless the order is obtained by a
11 government entity. ... [T]he federal prohibition against divulging communication data remains
12 stark, and there is no obvious exception for a civil discovery order on behalf of a private party.");
13 *see also Federal Trade Comm'n v. Netscape Communications Corp.*, 196 F.R.D. 559, 561 (N.D.
14 Cal. 2000) ("There is no reason for the court to believe that Congress could not have specifically
15 included discovery subpoenas in the statute had it meant to."); *In re Subpoena Duces Tecum to*
16 *AOL, LLC*, 550 F.Supp.2d 606 (E.D. Va. 2008) ("Agreeing with the reasoning in *O'Grady*, this
17 Court holds that State Farm's subpoena may not be enforced consistent with the plain language
18 of the Privacy Act because the exceptions enumerated in § 2702(b) do not include civil discovery
19 subpoenas."); *J.T. Shannon Lumber Co., Inc. v. Gilco Lumber Inc.*, 2008 WL 4755370 (N.D.
20 Miss. 2008) (holding there is no "exception to the [SCA] for civil discovery or allow for coercion
21 of defendants to allow such disclosure."); *Viacom Intern. Inc. v. Youtube Inc.*, 253 F.R.D. 256
22 (S.D.N.Y. 2008) ("ECPA § 2702 contains no exception for disclosure of [the content of]
23 communications pursuant to civil discovery requests.")

24 As you can understand, given the severity of the penalties under the ECPA, we cannot
25 release email content in response to your subpoena without firm assurance that the requirements
26 of the ECPA are met. Therefore, until we are provided with the valid, written consent of the
27 account holder(s), we must object.

1 **7. Objection to Production of Material Subject to EU Law.** Microsoft objects to
 2 the production of information sought by your subpoena to the extent it is subject to EU Regulation
 3 2016/679, the General Data Protection Regulation (“GDPR”). Microsoft is currently determining
 4 whether the data sought by your subpoena is subject to the GDPR; the process for making this
 5 determination takes approximately two weeks. Subject to, and without waiver of this objection,
 6 Microsoft may produce information responsive to your subpoena that Microsoft determines is
 7 not subject to the GDPR and/or non-content information with the consent of the account holder.

8 **8. Electronically Stored Information.** Microsoft objects to the subpoena to the
 9 extent it seeks production of electronically stored information from sources not reasonably
 10 accessible (e.g., legacy systems, backup media, temporary or ambient data), in light of the bur-
 11 dens or costs required to locate, restore, review, and produce whatever responsive information
 12 may be found. Known, difficult-to-access sources that may contain potentially responsive in-
 13 formation (others may exist and become apparent once the scope of the information sought by
 14 the Subpoena is properly defined), but which Microsoft is neither searching nor producing be-
 15 cause they are not reasonably accessible without undue burden, fall under the categories set out
 16 below: current disaster recovery media, obsolete back up media, legacy systems, sources
 17 requiring computer forensics to access, databases that are structured to hold or report information
 18 in certain formats and which cannot readily provide different data or data in different
 19 configurations, and source code. Microsoft is not able to retrieve information from many of these
 20 sources, or even confirm with certainty whether any responsive information in fact exists on the
 21 sources, without incurring substantial undue burden or cost.

22 **9. Timing of Compliance.** Microsoft requires approximately eight weeks to process
 23 new requests for Subscriber Data. Accordingly, we ask that you extend the deadline of your
 24 subpoena to permit Microsoft to properly comply with its internal procedures. In the event that
 25 you do not agree, we must object to your subpoenas on the ground that it does not permit a
 26 reasonable time for response.
 27

1 **10. Prepayment of Costs.** Microsoft requires the prepayment of its reasonable costs
 2 of complying with your subpoena before the production of documents. If prepayment is not
 3 remitted, Microsoft reserves the right to object to your subpoena and withhold the production of
 4 documents on the ground that the request is unduly costly and burdensome to Microsoft.
 5 Microsoft's third-party fee schedule is available upon request.

6 **11. Reservation of Rights.** These objections apply to each request in the subpoena.
 7 Microsoft reserves its right to supplement, amend, correct, or modify its responses herein.

8 **II. RESPONSES AND OBJECTIONS TO REQUEST FOR PRODUCTION**
 9 **REQUEST FOR PRODUCTION:**

10 All subscriber documents identifying name and contact information for 646-583-0824,
 11 land line of New York City, Zone 1, New York, NY.

12 **RESPONSE FOR PRODUCTION:**

13 Microsoft incorporates the above referenced general objections. Microsoft provides the
 14 following additional information for the sake of clarity. Microsoft will not produce documents
 15 without prepayment of Microsoft's reasonable costs for complying with the subpoena.

16 Microsoft objects to this request for failing to take reasonable efforts to reduce the burden
 17 on nonparty Microsoft. *See* Federal Rule of Civil Procedure 45(d)(1). In particular, Microsoft
 18 objects to this request to the extent certain information sought is in the possession, custody, or
 19 control of the account holder.

20 Microsoft interprets this request as seeking basic subscriber non-content data and
 21 registration information associated with the account(s): 646-583-0824. Without waiver of the
 22 above objections and upon prepayment of Microsoft's reasonable costs, and the expiration of the
 23 14-day notice period with no formal objections from the account holder, Microsoft will search
 24 for and produce subscriber non-content data and registration information associated with the
 25 account(s): 646-583-0824, to the extent it exists.
 26
 27

III. OBJECTIONS TO APPEARANCE

The subpoena purports to command Microsoft to appear in Boston, Massachusetts for the purpose of providing business records. Microsoft objects to this demand for an appearance simply to produce documents as unreasonable, unduly burdensome, and disruptive of nonparty Microsoft's business. The request fails for the following reasons, as well as those set forth above in Microsoft's general objections.

1. Failure to Reduce Burden on Nonparty. Microsoft objects to the subpoena for failing to take reasonable efforts to reduce the burden on nonparty Microsoft, as required by Fed. R. Civ. P. 45(d)(1). In this case, the appearance requested appears to be limited to the production of documents sought, presumably for authentication purposes. Under such circumstances, an appearance is unnecessary and imposes an undue burden on nonparty Microsoft where less burdensome means, such as the production of a narrow set of authenticated documents, are available.

2. Failure to Pay Witness Fee. Microsoft objects to the subpoena because it purports to demand that a witness appear but fails to pay a witness fee as required by federal law. *See* Fed. R. Civ. P. 45(b)(1).

3. Improper Place of Examination. Microsoft objects to the subpoena as improper because the demanded place of examination is not in King County, Washington, where Microsoft resides and regularly transacts business in person. *See* Fed. R. Civ. P. 45(c)(2)(A). The subpoena fails to comply with federal law regarding place of compliance.

Accordingly, Microsoft will not provide a custodian for deposition.

1 DATED this 31st day of May, 2022.

2 DAVIS WRIGHT TREMAINE LLP
3 Attorneys for Microsoft Corporation

4 By /s/ Jordan Harris

5 James Howard, WSBA #37259
6 Jordan Harris, WSBA #55499
7 920 Fifth Avenue, Suite 3300
8 Seattle, WA 98104-1610
9 Telephone: 206-757-8235
10 Email: JordanHarris@dwt.com

CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2022, I caused the foregoing document to be served by electronic mail to the following recipient(s):

Christine M. Kingston
Nelson Mullins Riley & Scarborough LLP
1 Financial Cntr, Ste. 3500
Boston, MA 02111

Christine.kingston@nelsonmullins.com

DATED this 31st day of May, 2022.

DAVIS WRIGHT TREMAINE LLP
Attorneys for Microsoft Corporation

By /s/ Jordan Harris

James Howard, WSBA #37259
Jordan Harris, WSBA #55499
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
Telephone: 206-757-8235
Email: JordanHarris@dwt.com